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Rights to Housing: Reviewing the terrain and exploring a way forward

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Abstract

Exacerbated by the specificity of housing as a welfare good, debates on housing, citizenship and rights are complex and often confusing. This article attempts to clarify the debate on rights-based approaches in the field of housing, shelter and homelessness. It focuses on the philosophical distinction between 'natural' and 'socially constructed' rights, and suggests that a plausible 'third way' may be found by using Martha Nussbaum's 'central human capabilities' approach as a foundation for universal human rights. 'Citizenship' is proposed as a conceptual bridge between the philosophical discourse on rights and its practical application in specific political contexts. For this purpose, T.H. Marshall's classic division between 'civil' and 'social' citizenship rights is translated into a distinction between 'legal' and 'programmatic' rights to housing. The article demonstrates that it is possible to object to the notion of natural and/or human rights in the housing field, and still be in favour of clearly delimited legal rights to housing for homeless people and others in acute need. Conversely, one may be in sympathy with the discourse of universal moral rights, but be sceptical about the allegedly 'atomising' implications of individually enforceable legal rights.

Keywords: right to housing, natural rights, socially constructed rights, legal rights, citizenship, capabilities, Nussbaum

Rights to Housing: Reviewing the terrain and exploring a way forward

Suzanne Fitzpatrick, Bo Bengtsson and Beth Watts

Introduction

This article examines rights-based approaches in the field of housing and shelter. Political and normative issues about housing, dwelling, shelter, homelessness and rooflessness are often framed in terms of rights and citizenship. On an abstract level, questions about 'rights to housing', and what housing standard should be entailed in being 'a full citizen', are of relevance to our general understanding of housing policy, nationally and internationally. On a more concrete level, they are of immediate, and sometimes painful, relevance to individuals and households with scarce economic and social resources, who face difficulties in finding adequate housing in the market, or may even risk homelessness.

Nevertheless, political debates on housing, citizenship and rights are complex and often confusing. One reason is that the concepts of 'rights' and 'citizenship' are used with a number of different meanings, often without being explicitly defined. This article aims to disentangle this conceptual confusion by exploring the philosophical foundations of rights discourses, and their practical application to housing, shelter and homelessness. In so doing, we seek to provide an overview and critique of rights-based approaches in this field. It should be noted that the article's focus is not on 'housing rights' (i.e. protection from eviction and harassment for those who have housing) but rather on the 'the right to housing' (i.e. for those who lack minimally adequate accommodation).

The article consists of three main parts. The first part is philosophical and theoretical, and takes as its departure point some fundamental distinctions between different types of rights that are of importance to the housing discourse, focusing in particular on the difference between understanding rights as 'natural' or 'socially constructed' and charts this distinction in relation to contemporary human rights discourses. Martha Nussbaum's 'central human capabilities' approach is put forward as a potential foundation for a universal human rights discourse. In order to link these abstract philosophical arguments to the more practical political level, we employ the general notion of citizenship, particularly as articulated in its classic form by TH Marshall, as a conceptual bridge.

The second part commences the discussion of political discourses on rights and shelter by focusing on the national level. We explore varying national policies, legislation and institutional arrangements – focusing on the difference between 'programmatic' and 'legally enforceable' rights – and analyse their merits and demerits, amongst other things in relation to questions about paternalism, stigmatisation and empowerment.

In the third part we switch our focus to the international political realm, and consider the role and function of international declarations and charters about rights to housing and shelter. Are they worth more than the paper they are written on? Can they have an effect on housing situations globally, or at least in some national settings? And should they have such impacts?

Notwithstanding their intuitive appeal, the article seeks to emphasise the importance of maintaining a critical perspective on right discourses in the housing field, and the premium to be placed on definitional clarity. Specifically, we hope to demonstrate that it is possible to object to natural and/or human rights in the housing field, and still be in favour of clearly delimited legal rights to housing for homeless people and others in acute need. Conversely, one may be in sympathy with the discourse of universal moral rights, but be sceptical about the allegedly 'atomising' implications of individually enforceable legal rights. For those seeking to establish a defensible foundation for a 'human right' to housing, we conclude that Nussbaum's capabilities approach provides a promising starting point.

The philosophical discourse: rights, capabilities and housing

A key controversy, and source of confusion, in the general rights discourse has to do with the origin of rights; whether rights are given by nature, or – somehow – socially constructed. 'Natural rights' are seen as inalienable and held by all human beings on the basis of religious or other innate norms or principles. 'Socially constructed rights', in contrast, are contingent upon socially shared norms, customs, or beliefs within a community or culture. How the origin of rights is perceived also carries strong implications for their application. If rights are seen as natural, it is nearer at hand to treat them as universal and non-negotiable than if they are seen as constructed in a certain social context.

The conception of natural or 'doctrinal' rights as a set of universal, inalienable entitlements held by all human beings began to emerge as part of the Western 'Enlightenment' during the 17th and 18th centuries, building on the ideas of philosophers like John Locke (Norman, 1998). Bills of Rights in England (1689), America (1789) and France (1789) reflected for the first time an understanding that individuals were the bearers of rights. This liberal tradition conceives of rights as fundamental, bestowed by God, or another divine source, or by some understanding of the nature of humanity. Natural rights have largely been concerned with people's 'negative' ('freedom') rights rather than 'positive' rights to substantive welfare entitlements like housing.

The jurisprudential roots of natural rights are to be found in the natural law tradition which holds that 'what naturally is, ought to be' (Finch, 1979, p. 29). In other words, the 'law of nature' should be used as a standard against which one can measure the validity or rightness of man-made law. Over the centuries, legal theorists have sought to derive this 'law of nature' variously from 'universal

nature', 'divine nature' and 'human nature' itself. According to the accompanying deontological (Kantian) style of ethics, an action is deemed morally right or wrong on the basis of the natural or 'universalisable' duties people owe to each other.

The rival jurisprudential tradition of 'legal positivism' firmly rejects natural law and natural rights, and insists instead on a strict separation between the 'Is' (man-made, positive law) and the 'Ought' (value judgements on that law). Legal positivists have highlighted the reactionary implications of the 'absolutist' natural law doctrine, and the way in which its speculative character leaves it open to abuse:

... natural law is at the disposal of everyone. The ideology does not exist that cannot be defended by an appeal to natural law.
(Ross, 1974, p. 261).

Natural law and natural rights have thus now largely been discredited as a basis for rights discourses (Turner, 1993), but 'human rights' are often regarded as their modern successor. They most often find their expression in international agreements and instruments, a number of which refer explicitly to housing, and which are discussed in a separate section below. For the moment, the key point is that human rights – like natural rights – can be understood as *moral* statements about human beings, specifying what they *ought* to have access to. But if one dispenses with theological justifications for human rights, then what is the *foundation* of their status?

Turner (1993) has argued that, in the absence of a metaphysical natural law, the philosophical foundations of human rights can most effectively be defended via an appeal to the universal nature of human 'frailty', particularly the frailty of the body. Such a position may quite readily be seen as encompassing a right to at least a basic level of shelter consistent with human physiological requirements. In a rather more ambitious vein, Norman (1998) argues that a derivative concept of rights can be based on the satisfaction of basic and universal human 'needs', as there are rational and objective ways of determining what these needs are (see also Doyal & Gough, 1991). Housing of a minimally 'acceptable' standard may be viewed as intrinsic to a conceptualisation of human rights derived from this perspective.

These sorts of arguments are thus not only highly relevant to our concerns pertaining to rights to shelter and/or housing, they are also intuitively appealing, based as they are on the common sense premise that people have a right to what they need – albeit that positivists might argue that they illegitimately derive an 'Ought' from an 'Is'. However, even if it is accepted that the 'Is/Ought gap' can be bridged by statements about human need, McLachlin (1998) gives good reasons for resisting any simple equation of needs and rights: there are many things we need but cannot be provided to us as of right. Ignatieff (1984), for example, argues that love, belonging, dignity and respect are all things that we need which cannot be provided within a framework of rights.

Another objection to a needs-based perspective has to do with paternalism. Often arguments about human needs to housing and other welfare goods are based on medical, psychological or socio-psychological scientific findings. Since such findings, and definitely their policy implications, are invariably contested, there is always an element of paternalism in deciding what housing people need, at least above an absolute minimum (Bengtsson, 1995, pp. 132–134). Such approaches may be viewed as negating the agency and dignity of homeless people and others in housing need, by failing to recognise their capacity to self-define their own needs.

A more promising approach we would argue is to be found in Steven Lukes' (2008) ambitious attempt to defend a 'contemporary objective morality' in what he describes as a 'post-metaphysical world'. He commences this task by posing the question:

Can one identify components of wellbeing that are present within any life that goes well rather than badly: conditions of human flourishing?
(Lukes, 2008, p. 129)

His answer is to look to the neo-Aristotelian 'capabilities approach', pioneered by Amartya Sen and Martha Nussbaum, which focuses on the 'substantive freedom' that people enjoy to achieve 'valuable functionings' in key aspects of their lives. The priority here is on the 'actual opportunities' a person has – what they are able to be or do – irrespective of whether they choose to exercise these capabilities. The capabilities perspective thus has the considerable merit of minimising accusations of paternalism (cf. Nussbaum 2011b, chap. 5, where she discusses the relationship between culture, politically-agreed capabilities, and individual choice).

Sen has, famously, refused to endorse a 'canonical list' of capabilities, citing '... a disinclination to accept any substantive diminution of the domain of public reasoning' (2005, p. 157). In his view, the capabilities approach is best viewed as an aid to clarification and transparency in public debate because:

... pure theory cannot 'freeze' a list of capabilities for all societies for all time to come, irrespective of what citizens come to understand and value. That would be not only a denial of the reach of democracy, but also a misunderstanding of what pure theory can do, completely divorced from the particular social reality that any particular society faces.
(Sen, 2005, p. 158)

However, Martha Nussbaum (1992, 2000), whom Lukes follows, departs from Sen on this point, developing a list of ten, philosophically-derived *central capabilities* or essential functions that, she argues, all humans value and require to live a good life. (She is therefore somewhat less 'constructivist' than Sen, although Sen in his writings *de facto* gives clear indications about where to go:

e.g. health, education, political participation and non-discrimination; cf. Nussbaum 2011b, p. 70.) Nussbaum's list includes: life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment. According to Nussbaum, each of these core human capabilities is a separate component which is independently important – so a deficit in one cannot be compensated for by a surfeit in another - meaning that her framework is 'irreducibly plural'. She also emphasises that her list has been drawn up in a deliberately abstract and general way, and is not exhaustive, so as to leave room for democratic development and local specification in the precise content. This open and pragmatic position lends a distinct constructivist touch to her approach.

Several of Nussbaum's capabilities are highly relevant to housing and homelessness, most obviously bodily health, bodily integrity, and control over one's environment. This is convincingly demonstrated, for example, by McNaughton Nicholls (2010) who discussed each of Nussbaum's ten capabilities in relation to housing and shelter based on qualitative study of transitions out of homelessness. As McNaughton Nicholls (2010, p. 24) comments: '[Capabilities] reframes housing as more than a material resource, but as a mechanism that can act to enable or constrain the functions required for a "well lived" life.' From a very different perspective, King (2003) similarly develops an account which makes explicit the link between housing and Nussbaum's central capabilities list, based on the 'situated nature of necessary human functioning' (p. 669). He argues that, in order to undertake a range of both basic and higher order functions, people must have a place to 'be', and it would be perverse to argue that this place should be other than in housing.

Crucially for our purposes, if these housing-relevant (and other) capabilities are accepted as necessary for basic human functioning, this opens up the possibility of their becoming politicised as human rights. Nussbaum makes this link via the notion that '... the ten central capabilities are fundamental entitlements inherent in the very idea of minimum social justice, or a life worthy of human dignity' (p. 25). She contends that these central human capabilities and consequent entitlements are 'prepolitical, inherent in people's very humanity' (p. 25), and therefore independent of membership of any particular political community.

Employing Rawlsian language, Nussbaum claims a high degree of *overlapping consensus* in the cross-cultural norms which underpin her core list of capabilities, contending that they derive from:

... an intuitively powerful idea of truly human functioning that has roots in many different traditions and is independent of any particular metaphysical or religious view.
(Nussbaum, 2000, p. 101)

Nussbaum's position can, we would suggest, be characterised as a form of 'universal constructivism', which offers a potential 'third way' between

(theologically derived) natural rights and (culturally delimited) social constructivism, by reference to socially constructed, but universally shared, norms. Likewise Sen, even whilst unwilling to commit to a 'fixed forever' list of capabilities, seems optimistic that an acceptable specification of capabilities, and human rights, will be able to 'survive open critical scrutiny in public reasoning' (p.163), commenting that '...the differences on the subject of freedoms and rights that actually exist between societies [are] often much exaggerated...' (p.162). Lukes (2008) too has attempted to make the case for universal *moral values* (distinguishing these from moral norms, which he concedes are more local and specific).

The idea that such a normative consensus exists at global level remains, nonetheless, highly arguable (Finch, 1979; Miller, 1998). However, the absence of such an empirical consensus need not be fatal to Nussbaum's and Lukes' theories about universal rights as they could, instead, be viewed as based on a sort 'moderate essentialism', according to which people share an inherent nature and a set of functions required for them to flourish, but without presupposing any unchanging natural order of things (Sayer, 1997; see also McNaughton Nicholls, 2010). Such an approach would encompass the 'objectivist' meta-ethical stance of Turner (1993) and Norman (1998) above, but would link it substantively to the universality of human capabilities requirements rather than to human frailties or needs. In this way, a secular 'naturalistic ethics' may also provide a third way between theologically-based natural rights and entirely socially constructed rights. Indeed, Nussbaum (1992) herself has made the case for such a 'humanist essentialism'.

Citizenship: linking the philosophy and politics of rights to housing

Thus far we have sought to establish that Nussbaum's persuasive articulation of 'moderate essentialism' or 'universal constructivism' may to some extent blur the ontological distinction between natural and socially constructed rights, and in so doing can provide a defensible philosophical foundation for human rights to substantive goods such as housing. In the following sections, we will take the step from this abstract philosophical level to the political level, where normative ideas about rights to housing and shelter are institutionalised, formally and informally, in specific jurisdictions. Regardless of whether rights on the ontological level are seen as natural, constructed or objectively essential, their meaning and application in a certain social and political context are always socially constructed. Ontological claims may be part of that construction, but there is no pre-determined way to translate such claims to national or international political discourse or policy.

Instead we see the classic Marshallian concept of 'social citizenship' as a conceptually useful bridge between these philosophical and political levels, because his attempt to describe the historical development of modern society, while not normative in itself, readily lends itself to a normative interpretation, with

its transparent implication that citizens are entitled to the array of rights he describes.

Marshall (1949/1964), who was heavily influenced by the UK experience and situation at the time, divided citizenship into three parts, each based on a particular set of rights. The first part he termed 'civil rights', i.e. the 'negative rights' necessary for individual freedom, including the rights to own property and to legal justice. The second part pertained to 'political rights', epitomised by democracy. And the third part focused on 'social rights', covering 'the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to standards prevailing in the society' (Marshall, 1949/1964, pp. 71–72).

Interestingly, Marshall himself takes housing to illustrate what he views as a critical conceptual distinction between 'civil' and 'social' rights. While civil rights are claims that must be met by the state in each individual case, with social rights:

... the obligation of the State is towards society as a whole, whose remedy in case of default lies in parliament or a local council, instead of to individual citizens, whose remedy lies in a court of law.
(Marshall, 1949/1964, pp. 104–105)

Thus Marshall distinguishes between, on the one hand, the enforcement of individual citizens' 'civil' rights to own property or to have their tenancy conditions respected, and on the other the 'social' right of the citizenry as a whole to the general housing standard members of a society can legitimately expect: '... when a slum is being cleared, an old city remodelled, or a new town planned, individual claims must be subordinated to the general programme of social advance'. This is especially so since housing policy covers the general conditions of the life of a whole community (Marshall, 1949/1964, pp. 105–106).

Marshall's modern interpreters seldom pay attention to this basic distinction, and instead tend to assume that 'social' rights constitute substantive entitlements to goods or services that ought, like civil rights, be enforceable in law at the behest of individuals (e.g. Dean, 2002). However, as we have seen, Marshall himself problematises the notion of legal enforceability as intrinsic to the notion of social rights in fields such as housing.

In the next section, where we take forward our discussion of the right to housing in national contexts, we will do so within this Marshallian perspective of citizenship, but instead of adopting Marshall's potentially confusing (and oft misinterpreted) language of civil and social rights, we will use the more modern (and transparent) terms of legal vs. programmatic rights. While *legal rights* are enforceable by individual citizens in domestic courts (Fitzpatrick & Watts, 2011), a *programmatic* approach to rights to housing 'binds the State and public

authorities only to the development and implementation of social policies, rather than to the legal protection of individuals' (Kenna & Uhry, 2006, p. 1). As programmatic rights thus 'express goals which political actors ... agree to pursue' (Mabbett, 2005, p. 98), such rights are best viewed as primarily 'political markers of concern' Bengtsson (2001, p. 255). Legal rights, on the other hand, provide an explicit 'right of action' for individual citizens. As we shall see below, clarity over this basic distinction is essential to the understanding of 'rights talk' in the housing and homelessness fields at national and international level.

The national realm: programmatic rights, legal rights and housing

It is important to begin by acknowledging that programmatic rights to housing, though unenforceable by the individual citizen, can find legal expression, very often in constitutional provisions (Fitzpatrick & Stephens, 2007). For example, in a number of European countries, including Spain, Portugal, Belgium, Finland and Sweden, there is a 'right' to housing contained in the national constitution, but there are seldom legal mechanisms provided to enable homeless individuals to enforce these rights:

The constitution [in Sweden] ... includes the word 'right' but this was never interpreted to mean that there was an enforceable right to housing for the individual citizen.
(Sahlin, 2005, p. 15)

To legal positivists such 'rights' are barely worthy of the name, as captured in the common law maxim 'no right without remedy'. Their interest would lie solely in 'black-letter' rights, enforceable by individual citizens via the relevant domestic court system. Such enforceable rights to accommodation for those who lack it are far from common in the housing and homelessness field, and where they do exist they are almost always limited to emergency accommodation (Fitzpatrick & Stephens, 2007). (It may be worth noting that legally enforceable entitlements are in fact also rare in other areas of 'in-kind' welfare, such as education and health, but somewhat more common with respect to cash transfers, see Dean, 2002).

Thus in Germany local authorities have a legally-enforceable obligation (under police laws) to accommodate homeless people who would otherwise be roofless, and in Sweden likewise there is a right to emergency shelter under social services legislation. In Poland, social welfare law obliges local authorities to offer help to homeless people, including shelter in hostels, refuges and other institutional settings, and in Hungary social welfare law obliges local authorities to provide accommodation in shelters for people whose 'physical well-being is at risk'. A single jurisdiction within the US – New York City – provides a legally-enforceable right to accommodation for the 'truly homeless' who have absolutely nowhere else to go.

The examples above all refer to temporary shelter in situations of acute distress. With respect to enforceable rights to permanent or settled housing for homeless people, at present these appear to be limited to the UK and France. The more longstanding arrangements in the UK, first established in 1977, are of particular interest here (Fitzpatrick *et al.*, 2009). They provide that local authorities must ensure that accommodation is made available to certain 'priority need' categories of homeless people, mainly families with children and 'vulnerable' adults. From the outset, the UK courts have held that homeless applicants can challenge local authorities' decisions under this legislation by way of judicial review, and over the past few decades a very substantial body of administrative case law has been generated by the statutory homelessness provisions. Homelessness applicants are also entitled to an internal review of the decision on their application, with a statutory appeal to a relevant court (on a point of law) additionally provided in England and Wales. In Scotland only, the ambitious target that virtually all homeless people should be entitled to settled housing from the end of 2012, achieved via a gradual expansion and then abolition of the priority need status, has now been achieved (see further below).

In France, a vociferous protest campaign resulted in emergency legislation being passed in 2007 which established a legally-enforceable right to housing (known as the 'DALO'). From 2012, all social housing applicants who experience 'an abnormally long delay' in being allocated accommodation have been able to apply to an administrative tribunal to demand that the State provide them with housing, with certain 'priority' categories, including homeless people, having been able to benefit from these rights from 2008 (Lacharme, 2008). This legislation was passed quickly in response to media pressure, and there are concerns that its vagueness in key areas, as well as the complexities of the administrative framework in France, will frustrate its implementation (Loison-Leruste & Quilgars, 2009).

To the extent that housing can be defined as a predominantly programmatic right in most political communities and as more of a legal right in (a few) others, this has a great deal to do with institutional arrangements within the national housing regimes, and in particular with the system of housing tenures. For example, a relatively large public rental sector with strong municipal control (like in the UK) provides a very different context for legal rights to housing than a small social sector owned by detached organisations with no, or only arms-length, municipal influence (like in Germany). And a public sector with allocations based on needs or means testing provides a very different context than a formally 'non-selective' system (like in Sweden). What is more, housing regimes and tenure systems are generally path dependent and politically and economically difficult to reform in response to changing societal conditions (Bengtsson & Ruonavaara, 2010). Thus national differences in terms of both legal and programmatic rights to housing also tend to be long-lasting.

Nonetheless, there are some obvious reasons why enforceable legal rights may be preferred to programmatic rights in the housing field. To begin with, those who administer welfare goods or services such as housing have power over claimants because they have an effective sanction against them (Spicker, 1984), and it can be argued that legal rights-based approaches create a counter-hierarchy of power by giving service users a 'right of action' against service providers (Kenna, 2005). A second and linked argument is that providing welfare goods such as housing as a matter of discretion stigmatises recipients, whereas receiving them as a matter of right does not. When service users are 'beneficiaries' rather than 'rights-holders', there is an implied debt of gratitude as the beneficiary is unable to honour the powerful norm of reciprocity. As such, the giver gains status, and the receiver loses it (Spicker, 1984). Approaches based on legal rights, it is argued, may overcome this problem of stigmatisation (Dwyer, 2004), and safeguard the self-respect of welfare recipients (Rawls, 1971), because they reflect their equal status as a citizen rather than their unequal status as a client (Spicker, 1984).

But there are also counter arguments. Enforceable legal rights such as a right to housing may be thought to contribute to the 'juridification of welfare', such that social policy becomes 'over-legalised', frustrating its fundamental purposes, and encouraging a defensive, process-orientated mindset on the part of welfare practitioners (Dean, 2002, p. 157). Some authors contend that enforceable legal rights foster an adversarial rather than problem-solving atmosphere in public services (O'Sullivan, 2008), and direct power and resources into the hands of the legal profession and away from service provision (see also De Wispelaere & Walsh, 2007). There may also be pragmatic considerations that caution against legal rights-based approaches, with Goodin (1986), for example, highlighting the costs and practical difficulties faced by service users attempting to realise those rights, calling into question the extent to which such rights can in fact empower those with housing needs in the context of deeply embedded hierarchies of power.

From a different angle, Bengtsson (2001, p. 266) raises doubts about the counter-stigmatisation potential of legal rights to housing. Related to Titmuss's (1958) general distinction between institutional and (more stigmatising) residual welfare states, Bengtsson associates a programmatic approach to housing with 'universalistic' systems, and a legalistic approach to more 'selective' housing regimes, with needs and means testing as part of the allocation procedure. Thus stigmatisation may be reinforced rather than diminished by enforceable and selective rights to housing.

While this conceptual argument persuasively captures the sharp contrast in approach between countries such as the UK and Sweden, it is challenged by the empirical facts elsewhere. Many selective housing systems (e.g. in the US, Canada and Australia) do not in fact offer any enforceable legal rights to housing, with the notion of social entitlements rather than self-reliance anathema in these

contexts. So there is a strong emphasis on means testing without legal entitlements. Conversely, many countries (e.g. in southern Europe) that offer programmatic rights (e.g. constitutional rights to housing) do not have universalistic housing policies, but rather very limited state intervention in housing.

It remains nonetheless the case that, in those few instances where enforceable legal rights are provided, these are inevitably selective in nature. Margaret Levi's (1997) 'theory of contingent consent', according to which universal systems of state intervention are more acceptable to citizens in general than selective ones, since they do not draw the same clear line between 'us' as givers and 'them' as takers, is therefore highly relevant (see also Larsen, 2006). In housing this line may be particularly visible, since it is sometimes drawn concretely and conspicuously between physical housing estates. Unlike the individual-level stigmatisation argument, Levi's discussion concerns the legitimacy of different systems at the societal level, and in particular among taxpayers, indicating that residual and selective systems tend to be more controversial, and consequently smaller in scope and more vulnerable to budget cuts, than institutional and universal ones.

A recent comparative study by one of the authors sheds empirical light on some of these issues, particularly with respect to how they play out at the individual level. Comparing the experiences of single homeless men in the (strongly legal rights-based) Scottish system with the (non legal rights-based) Irish system, Watts (2013) argues that legal rights to housing in Scotland support demonstrably better outcomes for this group in terms of meeting their need for settled housing. Moreover, in line with Lewis & Smithson (2001), the research further suggests that a framework of legal rights has discursive and psycho-social impacts, with 'statutory rights ... becom[ing] internalised as a sense of entitlement' (p. 1477) and help to construct the claims of this group as legitimate among those working in the sector. Crucially, these positive impacts do not appear to depend on the actual pursuit of legal challenges by individual homeless households, but rather on more subtle mechanisms, including the tight parameters legal rights cast around the discretion of service providers, and the capacity of such enforceable rights to 'crowd out' competing policy objectives or concerns at the 'street level'.

These findings are very much in keeping with broader international evidence that suggests that enforceable statutory rights frameworks, such as those pertaining in the UK, help to counter the tendency for social landlords to exclude the very most vulnerable, and poorest, households from their properties (Fitzpatrick & Stephens, 2007; Pleace *et al.*, 2012).

The international realm: human rights, international law and housing

At the international level, Marshall's conception of citizenship is more difficult to apply. The reason for this is that national rights, whether legal or programmatic, can be related to the jurisdiction of a nation state with its legislative power and, ultimately, its Weberian 'monopoly on the legitimate use of violence'. The status of international rights is more ambivalent due to the anarchistic character of the international community and the lack of an authoritative 'state' to supervise their fulfilment (see further below).

Human rights are most often encapsulated in international agreements and instruments, many of which encompass 'positive' social rights, including rights to housing. For example, Article 25 of the United Nations Universal Declaration of Human Rights (1948) asserts:

Everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including food, clothing, housing and medical care and necessary social services.

While this resolution is not formally binding, it is considered a key part of international customary law and has provided the principal foundation for subsequent debate on universal human rights. Other international instruments do impose obligations on ratifying states, binding in international law, which are relevant to the right to housing. These include the UN International Covenant on Economic, Social and Cultural Rights (1966), and at European level, the Charter of Fundamental Rights (European Union, 2000), and the European Social Charter (Council of Europe, 1961, revised in 1996) (Kenna, 2005). Perhaps of greatest practical consequence for our present purposes is Article 31 of the Revised European Social Charter (1996). This Article obliges contracting states to take measures designed to promote access to housing of an adequate standard, to prevent and reduce homelessness with a view to its gradual elimination, and to make housing affordable to all. Crucially, a mechanism for 'collective complaints' was introduced under this Charter, and this has been used by FEANTSA (an EC-funded homelessness lobby organisation), for example, to establish that France had violated the right to housing for all (Kenna & Uhry, 2008).

Whatever their legal ramifications, such human rights-based verdicts can be viewed, as we have argued above, as primarily *moral* statements, bringing ethical pressure to bear on relevant states to take measures to change their policy and procedures. Such a moral interpretation of human rights accords with the sentiments of human rights advocates and organisations, who take the position that the rights specified in these international instruments make 'moral claims on the behaviour of individual and collective agents, and on the design of social arrangements' (UNDP, 2000, p. 25). Neglect of the demands they imply therefore 'involves a serious moral – or political – failure' (UNDP, 2000, p. 24).

'Human rights-talk' thus carries with it considerable ethical and intuitive force, but beneath its ostensible appeal lie fundamental conceptual and empirical questions. As Sen has remarked:

... despite the tremendous appeal of the idea of human rights, it is also seen by many as being intellectually frail – lacking in foundation and perhaps even in coherence and cogency.
(Sen, 2005, p. 151)

Three key problems with human rights – and their applicability in the housing and homelessness field – are considered here: their contested normative value and coherence, their lacking enforceability, and their abstract nature.

First, and most fundamentally, intrinsic to most discourses on human rights is the idea that they are self-evident, inalienable, and non-negotiable: 'absolute' in other words. But are the rights declared by the architects of international and European human rights instruments – particularly material rights such as the right to housing – any less politically contested than other claims about how material resources should be distributed in society? One could argue that labelling such claims as moral 'rights' is a mere rhetorical device intended to shut down debate by investing one's own particular political priorities with a 'protected' status – after all, as Dworkin (1977) puts it, 'rights are trumps'. Notwithstanding the emphasis placed on 'public discourse' by some rights theorists (for example Sen, 2005), it is difficult to escape the sense that some rights enthusiasts are seeking to put certain matters 'beyond' or 'outside of' politics and, at least in democratic contexts, such a move requires robust normative justification. Whether such justification exists turns in large part on how convincing one finds the foundational discussion above: has Nussbaum (or anyone else) succeeded in demonstrating a universal basis for non-negotiable rights? And, if so, can this universal basis be consistently and convincingly translated into universal substantial entitlements to welfare goods such as housing?

There is also the closely related, but distinct, point that rights can conflict (Waldron, 1993), and the more expansive they are, the greater the likelihood of a clash; hence the rather modest focus on 'minimal justice' (Nussbaum, 2011a) in many rights discourses. Acknowledgment of this point means that some writers sympathetic to human rights, notably Sen and Waldron, view them in less than absolutist terms, but rather as part of a system of social goals that may sometimes have to be traded-off or balanced against each other – albeit in a context of utmost respect for the individual, rather than an overriding interest in aggregative social welfare. Even Nussbaum, while insisting that both capabilities and rights are 'trumps', in the sense that they have a very strong priority over the pursuit of welfare generally, acknowledges that there may sometimes have to be 'tragic' choices made which inevitably violate rights (2011a, p. 34). Notwithstanding these nuances, there is a strong thread of uncompromising – yet unrealisable – moral absolutism in much rights talk (Waldron, 2003), which Ignatieff for one argues is inimical to open debate:

Activists who suppose that the Universal Declaration of Human Rights is a comprehensive list of all the desirable ends of human life fail to understand that these ends – liberty and equality, freedom and security, private property and distributive justice – conflict and, because they do, the rights that define them as entitlements are also in conflict ... The idea of rights as trumps implies that when rights are introduced into a political discussion, they serve to resolve the discussion. In fact, the opposite is the case. When political demands are turned into rights claims, there is a real risk that the issue at stake will become irreconcilable, since calling a claim a right is to call it non-negotiable, at least in popular parlance.
(Ignatieff, 2000, pp. 299–300).

From a philosophical perspective, this challenge to the coherence of absolutist human rights can be traced back to the concept of value pluralism, most closely associated with Isaiah Berlin:

... the ends of men are many, and not all of them are in principle compatible with each other, the possibility of conflict – and of tragedy – can never wholly be eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.
(Berlin, 1969, p. 214)

Conflicts between values of this kind are evident in the housing policy sphere, with – for instance – social housing allocations seeking to fulfil the competing objectives of meeting housing need, rewarding desert, accommodating individual freedom of choice, and sustaining ‘balanced’ communities. While some such trade-offs may be eased in a context of plentiful resources (e.g. a large, evenly dispersed stock of social housing, which suffers no sharp gradient in housing quality or neighbourhood desirability). These conditions are rarely experienced in practice (Fitzpatrick and Stephens, 1999). Thus, whatever compromise is struck between competing housing policy objectives, the distributive outcome can almost always be viewed as violating someone’s absolute ‘right’ to a standard of housing that meets both their physical and social needs.

The second common critique of human rights concerns their lack of enforceability within current institutional contexts. Scruton (2006) powerfully articulates this objection, from what is clearly a legal positivist stance:

Rights do not come into existence merely because they are declared. They come into existence because they can be enforced. They can be enforced only where there is a rule of law ... Outside the nation state those conditions have never arisen in modern times ... When embedded in the law of nation states, therefore, rights become realities; when declared by transnational committees they remain in the realm of dreams – or, if you prefer Bentham’s expression ‘nonsense on stilts’.
(Scruton, 2006, pp. 20–21)

Arguing from a very different perspective, Arendt (1973), writing after two world wars which had killed and displaced millions of people, exposed the limits and 'hopeless idealism' (p. 269) of the human rights discourse, and in particular:

... the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as 'inalienable' those human rights, which are enjoyed only by citizens of the most prosperous and civilised countries, and the situation of the rightless themselves.
(Arendt, 1973, p. 279)

Against this, there are those who argue that the *fulfilment* of rights must be distinguished from the matter of their *existence*, and that to insist otherwise is to maintain too rigid a link between rights and the 'perfect' (i.e. exact and strict) duties of particular agents (UNDP, 2000). In this view, human rights are better understood as general moral claims against society as a whole, with the Kantian notion of 'imperfect duties' reflected in Waldron's (1993, p. 23) conceptualisation of rights as "held by each individual against the whole world". Rights advocates would, of course, nonetheless like to see progress towards the fulfilment of these imperfect duties, and Kenna (2005), writing specifically about rights to housing, focuses on the ways in which the gap between rhetoric and reality on human rights could be narrowed through better systems of international governance and accountability in order to realise enforceable human rights beyond the boundaries of the nation state. According to Kenna, those committed to helping homeless people need to focus efforts on ensuring that 'the human rights obligations accepted by States at international level are vindicated at national, regional and local level' (p. 29).

However, this emphasis on improved enforceability brings us to the third key objection to human rights approaches to tackling social issues like housing need and homelessness. The 'rights' expressed in international instruments are, inevitably, broad and abstract in nature rather than detailed, delimited and contextualised. They are thus quite different in nature to the 'democratically endorsed legislation' discussed in the section above in relation to rights to housing in the UK and France. Indeed, it is worth emphasising in this regard that the Scottish reforms establishing legal rights to housing for virtually all homeless people referred to above emerged from a domestic consensus between political elites and those working in the homelessness sector concerning how best to improve responses to homelessness, and owed nothing to international human rights law and discourses.

If the abstract rights as expressed in international instruments – as opposed to the detailed entitlements articulated in domestic legislation – were in fact to be rendered routinely enforceable via courts (international or domestic) this would amount to a major transfer of policy-making power from the political to the legal sphere. Particularly in the case of material rights such as the right to housing, the granting of wide-ranging policy discretion to the courts implies (unelected) judges

determining the allocation of scarce resources in situations where 'hard choices' have to be made between a range of needy and/or deserving cases (see also King, 2003). The term 'over-socialisation' has been used to describe the situation wherein courts are inappropriately used to decide such 'polycentric' policy issues (Dean, 2002), and there are obvious constitutional and democratic concerns about judges rather than politicians setting broad policy aims and priorities. As some prominent legal scholars have recently commented about 'human rights juristocracy', i.e. circumstances wherein the 'constitutionalisation' of rights has transferred significant amounts of power from representative institutions to judiciaries (cf. Hirschl, 2007).

[this] feeds the unfortunate assumption that if human rights are at issue then we have a matter that should be de-politicised and therefore de-democratised to the point where we look to courts rather than parliaments to solve our major political problems ... [while] human rights enthusiasts castigate human rights sceptics for being naive about real world twenty-first century democracy ... human rights sceptics attribute even greater naivety to those who see courts as democratic substitutes.

(Campbell *et al.*, 2011, p. 10)

In spite of these weaknesses, human rights discourses retain a key strength. 'The articulation of imperfect duties' (UNDP, 2000, p. 26) encompassed in the human rights framework has been argued to constitute a *discursive resource* (Dean, 2009, p9), with 'rhetorical and agitprop merits ... when it comes to exposition or to 'consciousness raising' (UNDP, 2000, p. 24). From this perspective, human rights are 'political instruments to mobilize dissent, protest, opposition and collective action aimed at social and economic reform' (Fortman, 2006, p. 38; see also Waldron, 1993). Furthermore, as Isaac (2002) notes, it is irresponsible to simply deconstruct and expose the weaknesses of the human rights discourse without proposing alternative, superior ways of pursuing social justice or at least humanitarian goals on a global basis (Miller, 1999). Even Ignatieff – a sceptic of the human rights discourse in other regards (see quote above) – sees human rights as a valuable 'shared vocabulary' (Ignatieff, 2000, p. 349), and it is a vocabulary that is extensively drawn upon by organisations representing those in housing need (FEANTSA, 2008).

So, for all their philosophical and practical limitations, human rights may be considered a 'useful fiction', justified, perhaps ironically, on the consequentialist basis that they do more good than harm, especially in countries where democratic traditions and the protection of minorities remain weak or underdeveloped. Such a stance, it could be noted, is very much in keeping with the 'outcome-orientated' approach of Nussbaum (2011a), and the 'broad consequentialism' of Sen (2006).

Concluding discussion

This article has attempted to untangle the complexity of the concept of 'rights' within the field of shelter, housing and homelessness. It commenced by drawing out some key distinctions within the philosophical discourse on rights, focusing in particular on the division between natural rights and socially constructed rights, suggesting that something of a 'third way' can be found in the 'universal constructivism' (or 'moderate essentialism') of Nussbaum's central human capabilities approach, that may in turn provide a philosophically defensible foundation for human rights in the housing field. It proposed 'citizenship' as a conceptual bridge between the philosophical discourse on rights, and its practical application within particular institutional and political contexts at national or international level. We translated Marshall's classic, though somewhat ambiguous, division between 'civil' and 'social' citizenship rights into a distinction between 'legal rights' to housing (individuals' formal rights to a dwelling of certain standard) and 'programmatic rights' to housing (what general housing standard members of certain society can legitimately expect).

It may reasonably be argued, to borrow a legal metaphor, that the 'jury is still out' on the relative benefits and disbenefits of enforceable legal rights to housing at national level. However, a recent comparative study by one of the authors provides some support for a positive interpretation of the potential of enforceable rights in this field, demonstrating that the Scottish (strongly legal rights-based) model not only succeeds in prioritising the housing needs of single homeless men (by crowding out provider discretion), but also has psycho-social impacts, helping to combat the stigma of homelessness (by countering 'status loss') and 'empowering' homeless people in their interactions with service providers.

At the international level, key criticisms of human rights to housing (and other material goods) focus on their contested normative value and coherence and their lacking enforceability, and also the extent to which such, necessarily abstract, rights may imply a major and inappropriate transfer of policy-making discretion from the political to the legal sphere. At the same time, there is a credible argument that, whatever their shortcomings, the discourse of international human rights may do more good than harm, especially in the absence of an alternative model for pursuing global social justice.

A key purpose of this article has been to highlight the complexity of the concept of rights as applied in the housing and social policy field, and the importance of clarity when engaging in any form of 'rights talk'. In particular, we sought to demonstrate that it is perfectly possible to object to natural and/or human rights in the housing field, on either philosophical or pragmatic grounds or both, and still be in favour of clearly delimited legal rights to housing within specific domestic legal systems. Conversely, one may be in sympathy with the discourse of universal human rights, but be sceptical with respect to the alleged juridification and atomisation associated with individually enforceable legal rights. For those who seek to establish a firm foundation for a 'human right' to housing, we commend Martha Nussbaum's 'central human capabilities' approach as providing

a promising starting point for taking this debate forward to the next stage, both politically and philosophically.

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